Nos. 1013, 1014, 1015

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

ROBERT R. HARE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

JOHN M. HARE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

CLINTON L. HARE, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF FOR PETITIONERS.

DANIEL S. RING,
1737 H Street, N. W.,
Washington 6, D. C.

C. LEO DEORSEY,
401 National Savings & Trust Building,
Washington 5, D. C.
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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GENERAL.

In its brief in opposition (pp. 1-6) the government raises no points of fact or procedure contravening the points presented by your petitioners in their petition and brief.

Although it is a more general presentation, the government's brief as to the opinion below, the jurisdiction of this Court, the questions presented and the statement, coincides, as far as it goes, with the presentation heretofore made by your petitioners.

As to the following details, however, now before this Court in the petition and brief supporting it, the government brief raises no points of controversy, and is silent concerning them:

(1) That the whiskey which was sold was not owned, sold or delivered by your petitioners (Pet. 3, 16).

(2) That the government sought and failed to show sales by an agent for the defendant company, one Frank J. Clark, as an essential element in its theory of case at trial (Pet. 27, 28, 29).

(3) That the Circuit Court of Appeals, in sustaining conviction on substantive counts, took into consideration facts not related to the substantive counts (Pet. 20).

(4) That the Circuit Court of Appeals, in ruling on the conspiracy count, erroneously relied upon and viewed as genuine the pseudo-agency of Clark in behalf of the defendant company as a basis for determining the guilt of your petitioners (Pet. 29).

(5) That the failure of the government to make more explicit the general testimony of its prime witness, Rozelle, after such testimony was flatly controverted by petitioners, created a presumption unfavorable to the government on trial (Pet. 20).

ARGUMENT.

The brief in opposition results in automatically presenting the argument in two main phases: (1) The case as to Robert R. Hare and (2) the case as to Clinton LaRue Hare and John M. Hare.

(1) Position of Petitioner Robert R. Hare.

Your petitioner, Robert R. Hare, with respect to the government's argument (Gov't. Br. 6-8) stands on the petition and supporting brief.

(2) Position of Petitioners Clinton LaRue Hare and John M. Hare.

As to your petitioner, Clinton LaRue Hare, the government relies wholly and solely for sustaining the verdict and judgment upon the fact that he received a share in the proceeds of the alleged illegal sales when a division of such proceeds was made, after all of the transactions were finished (Gov't. Br. 6, 7).

As to your petitioner, John M. Hare, the government relies upon the same fact regarding division of proceeds, but also remarks: "There is also evidence that John Hare kept $92,500 for Rozelle overnight and that he took part in discussion at the time a ceiling price was first placed on bulk whiskey." (Gov't. Br. 6)

Relying upon these premises, the government argues that it was "clearly in the jury's province to infer that these two defendants, who stated that they took no active part in the liquor department of the company, were not given one-fourth of the proceeds, amounting to more than $42,000, without an agreement making them parties to the venture." (Gov't. Br. 6, 7)

As to John Hare, all of the facts concerning the $92,500 have been recited in the brief of your petitioners (Pet. 25). There is one point contained therein, however, which it is now felt necessary to stress in behalf of John Hare.

The testimony of Rozelle with respect to the transaction involving the $92,500 contains what at first blush appears to be an insignificant fact, but which, upon analysis, rises staunchly and strongly to the defense of John Hare. Having recited that he had asked John Hare to keep a package containing $92,500 for him overnight, Rozelle stated that the next day "John Hare simply throwed the bundle to"

him (Pet. 27, R. 73). Rozelle then turned the package to Robert Hare (R. 73). Now, John Hare was Presi over of the company. He was Robert's brother. Rozelle vident company salesman. If John knew what was going on, was a leged; if he were one of the conspirators engaged as al- partnership with common design with Rozelle and R in a Hare, as alleged; if he knew how and where and in obert manner the proceeds of the venture were being ha what (as he should, if he were such a partner) and that R dled was ultimately to get the package (as Rozelle imp obert would he, John Hare, superior in company affairs to lied), Robert and Rozelle, after keeping the package fo both salesman overnight, have returned it to the salesma the given it directly to the one who ultimately, as allegan, or Rozelle, was to have its custody? ed by

Real truth is gleaned not from outstanding facts importance of which all appreciate, but from such s, the nificant facts as these, which appear as a useless det insig- first inspection, but which assume great proportions tail at determination of what is the truth, when analyzed. in the

Therefore, your petitioner, John M. Hare, here a that the only inference which can arise from this cir argues stance is that he took a package of money from Roz rcum- Rozelle's request, kept it as Rozelle requested over elle at and returned it to Rozelle the next morning. No inf night, here is possible in reason that, in so doing, John Har erence participating knowingly in a criminal design as a re was wilful conspirator, knowingly handling conspiratoria guilty, ject matter. al sub-

With respect to the matter cited by the governm its brief (page 6) concerning John Hare's "part i ent in cussion at the time a ceiling price was placed on bulk in dis- key (R. 109, 110)," your petitioner, John Hare, rel k whis- the record only (and incidentally upon the very sam lies on identical excerpt from the record that is cited by th ne and ernment). This reads as follows: he gov-

(John Hare testifying on direct examination at the trial (R. 109, 110)): "In 1943 there was a ceiling price placed upon bulk whiskey at which time Mr. Bruhn, who was then with the company, came to the witness and explained that the company owned about 340 barrels of bulk whiskey, and over night the OPA had put a ceiling on it and that J. C. Perry & Company had sustained a severe loss by the fixing of the ceiling price. Mr. Bruhn said the condition was critical and wanted to know what the witness thought about the matter. Later there was a discussion between the witness as president of the company and Mr. Robert Hare and Mr. Bruhn as managers of the liquor department. Mr. Bruhn and Mr. Robert Hare as managers of the liquor department said that by selling this liquor out of the state the company could avoid salesmen's commissions, some local freight or warehoues charges on it *and the witness gave his consent that this be done.*

"In answer to the Court the witness said that he was not acquainted with the whiskey department and could not tell the value of the whiskey. The witness supposed the whiskey would become more valuable as it aged; but as they owed the bank some money they decided *to take the loss and put their money to some other use.*

"In further answer to counsel, the witness stated that he had served on the OPA board in fixing prices in the grocery department. *In the discussion of the disposition of this whiskey the witness specifically directed that care be taken to have the ceiling price determined and sell only at the ceiling price.*

"Mr. Bruhn and Robert had charge of this whiskey department but did from time to time consult the witness about selling this whiskey. Some five or six weeks after witness consent was given to the sale in Ohio Mr. Rozelle came and said to the witness, 'John, you should never be sorry that Fred and Bob sold that whiskey in Ohio instead of sending it to Chicago or out west to California,' and I asked him what he meant and he said because they had sold it in Ohio, and he made arrangements with a man over there who was going to pay him a finder's fee. I asked him if that was permitted, and he said, 'Yes.' (He may not have used the term finder's fee but was going to pay Rozelle money for any whiskey he could get.) That the tav-

erns or package stores were willing to pay someone to find the whiskey for them. The witness says that he was not familiar with the operations and upon inquiry Mr. Rozelle further told him that he was going to get the money and was going to divide it four ways; that the witness asked him if this was legal, and he said: 'There is nothing wrong because finder's fees are being paid all the time.' At a later time the witness asked his brother Bob about finder's fees and was told there was nothing wrong with it. That it was all right *and the witness dismissed the question from his mind.*"

It is submitted that the above record diametrically opposes any inference that such discussion implies an agreement by John Hare to formulate or participate in an illegal venture. Your petitioner, John Hare, therefore offers the record cited by the government as his argument on this point.

That the above discussion, referred to by the government, is the only discussion even remotely connected with the alleged venture is further attested by the words of the government's prime witness, Rozelle, on redirect examination (R. 89) when he said: "There was never a time when he, Robert Hare, Clinton Hare and John Hare, were in a meeting concerning the division of this money and they were never all present when the matter was discussed."

As to the substantive counts, with respect to both of your petitioners, John Hare and Clinton LaRue Hare, these petitioners urge that the vague testimony presented by Rozelle during the government's case in chief, as presented in petitioners' brief (Pet. 19-21) was in and of itself insufficient to warrant sending the case to the jury, for the reasons set forth. After reading the brief in opposition, however, your petitioners, John Hare and Clinton LaRue Hare, now further argue that even conceding they received a share of proceeds from funds derived from illegal sales covered by the substantive counts, nevertheless, such mere receipt of the proceeds, after the transactions had been concluded and finished, when viewed in the light of the sur-

rounding circumstances, is insufficient in and of itself to warrant submission to the jury of the question on their guilt.

Under issues now so clearly drawn, it appears to petitioners that the case of *Bollenbach* v. *United States,* (No. 41, current docket), decided by this Court on January 28, 1946, exercises a controlling influence.

In that case, Bollenbach was charged with transporting securities in interstate commerce, knowing them to have been stolen, and for conspiring to commit that offense. In this case, your petitioners are charged with selling and delivering whiskey, knowing that the price at which the same was sold and delivered exceeded the lawful ceiling price therefor, and with conspiring to do the same.

In the Bollenbach case there was no doubt that the securities had been stolen in Minneapolis and were transported to New York. It was not controverted that Bollenbach helped to dispose of them in New York.

Upon the basis of Bollenbach's possession of the stolen securities in New York, the government sought to invoke the theory that the fact of his possession of the same was sufficient to permit a jury to infer that he knew the same had been stolen and that he had participated in the conspiracy to steal them.

This Court held that such mere possession was insufficient to create a presumption of knowledge of the theft or participation in the conspiracy.

In this case, in so far as your petitioners, John Hare and Clinton LaRue Hare are concerned, it is their acceptance of money derived from alleged illicit liquor sales, after such transactions had been fully completed, upon which the government relies for sustaining verdicts of guilty as to both sales and conspiracy.

Paraphrasing the words of this Court in the Bollenbach case, your petitioners, John Hare and Clinton LaRue Hare, here argue that the prime question now before this Court is "whether guilt has been found by a jury according to

the procedures and standards appropriate for criminal trials in the Federal courts."

The government, in its brief, brings this question into stark relief in these words (Gov't. Br. 6, 7): "*It was, however, clearly in the jury's province to infer* that these two defendants, who stated that they took no active part in the liquor department of the company, were not given one-fourth of the proceeds, amounting to more than $42,000, without an agreement making them parties to the venture."

If there had been an agreement, was not the same within the knowledge of Rozelle, the government's prime witness and the chief movant in both sales and conspiracy? Why did he remain mute on this point? He was the engineer of the transactions; he supplied testimony concerning many minute details with respect to them. When he is silent as to so salient a fact as the agreement of John and Clinton Hare to become partners with him in this venture, is not the conclusion inescapable that no such agreement ever existed? Does not Rozelle's failure here to speak out constitute a circumstance of negation precluding consideration of a pure speculation offered by the government, namely, that because two men accepted money from their brother, after assurances of its legality by both their brother and Rozelle, who had intimate knowledge concerning the subject matter, while they had none, there should be an inference raised (to the exclusion of inferences of innocence) of retroactive knowledge and participation in the then finished illegal transactions?

Your petitioners argue that since the one who knew most about the transactions was a government witness at the trial, it then and there became essential for the government to produce at least some substantial evidence that they agreed to the venture and participated in it before the case against them could properly have been submitted to the jury. At the very least, the government should have demonstrated the impossibility of producing such evidence. In the unexplained absence of such evidence within control

of the government, certainly the remedy for the fatal omission is not the suggestion that the jury's province extends to guesswork and speculation.

Rozelle's own words (R. 89) indicate that if he had been asked directly: "Did John Hare and Clinton LaRue Hare to your knowledge ever agree to a plan for selling whiskey in excess of ceiling prices?" his answer may well have been in the same words that appear in his redirect examination (R. 89): "They were never all present when the matter was discussed."

In closing, your petitioners respectfully draw again to the attention of this Court the words of the Tenth Circuit Court of Appeals in *Leslie* v. *United States,* 43 F. (2) 288, 290: "When the proof rests on circumstances which lead as rationally to the conclusion of innocence as of guilt, there is no proof of guilt and nothing to go to the jury. *Juries are not permitted to speculate in civil cases as to the negligence of the defendant; they should not be permitted to guess at the guilt of a defendant in a criminal case.*"

John Hare and Clinton Hare say that the government's proposition that it was in the jury's province "to infer the guilt of these defendants" and their agreement in an illegal venture from the fact that after the venture was all over they received some of the proceeds thereof from their brother is tantamount to a proposal that the jury be "permitted to guess" at their guilt.

(All italics in this brief have been supplied by us.)

Respectfully submitted,

DANIEL S. RING,
1737 H Street, N. W.,
Washington 6, D. C.

C. LEO DEORSEY,
401 National Savings & Trust Building,
Washington 5, D. C.
Counsel for Petitioners.